IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 18144 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE M.R. SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BIPINCHANDRA P PATEL (VAKIL)

Versus

MAFATLAL AMBALAL PRAJAPATI

Appearance:

1. Special Civil Application No. 18144 of 2003

MR GM JOSHI FOR MR SHIRISH JOSHI for Petitioner No. 1-4

MR SEJAL SUTARIYA FOR MR VH DESAI for Respondent No. 1

NOTICE SERVED BY DS for Respondent No. 2

CORAM : HON'BLE MR.JUSTICE M.R. SHAH

Date of decision: 13/05/2005

CAV JUDGEMENT

In this petition under Article 226 of the Constitution of India, the petitioners have challenged the legality and validity of the judgment and order dated 20.12.2003 passed by the Gujarat Primary Education Tribunal, Ahmedabad passed in Application No.80 of 2003.

.RS 2.

#. This special Civil Application was earlier dismissed by the learned Single Judge of this Court, against which, Letters Patent Appeal No.2557 of 2004 was preferred and the Division Bench of this Court by its order dated 14.3.2005 allowed the said appeal and set aside the order passed by the learned Single Judge of this Court dismissing the Special Civil Application on the ground that the order passed by the learned Single Judge did not contain any reason and that is how the present special civil application came to be heard by this Court.

#. It appears from the record that by order dated 22.8.1983, respondent No.1 - Shri Mafatlal Ambalal Prajapati was appointed as Assistant Teacher in the services of Sardar Patel High School (Primary Section) and he resumed the duty on 22.9.1983. After a period of almost twenty years he was served with the notice dated 17.1.2003 and was called upon to show cause as to why his services should not be terminated on the ground that his appointment was contrary to the provisions of the Bombay Primary Education Rules, 1949. The respondent No.1 teacher replied to the said show cause notice and by order dated 23.10.2003 the petitioners management passed the order of terminating his services. Being aggrieved and dissatisfied with the order of termination, the respondent No.1 filed application before the Gujarat Primary Education Tribunal (hereinafter referred to as the "Tribunal") with prayers for restraining the management of the school from terminating his service and by order dated 23.10.2003 the Tribunal stayed the order by which services of the respondent No.1 was terminated. Thereafter, the Tribunal by judgment and order dated 20.12.2003 allowed the said application filed by the respondent No.1 and directed his reinstatement with pay and allowance which is challenged by the petitioners by way of present special civil application under Article 227 of the Constitution of India. It is required to be noted that though the present special civil application is termed under Articles 226 and 227 of the Constitution of India, however, in fact the same is under Article 227 of the Constitution of India as the judgment and order of the Tribunal is challenged in the present Special Civil Application.

#. Shri G.M.Joshi, the learned advocate appearing on behalf of the petitioners has vehemently submitted that the respondent No.1 was appointed in violation of the statutory provisions contained in the Bombay Primary Education Act and the Rules, more particularly,

Schedule-F and as such, he has no right to remain in service. It is further submitted that as at the relevant time when the respondent No.1 was appointed, the procedure as required to be followed under Schedule-F to the Act and the Rules, was not followed and the appointment of the respondent No.1 was illegal and was in fact a back door entry, the Tribunal ought not to have passed the order of reinstatement. It is further submitted that the Tribunal has materially erred in holding that at the relevant time when the respondent No.1 was appointed, provisions of Schedule-F were stayed by this Court and there was stay of entire Schedule-F and therefore, appointment of respondent No.1 cannot be said to be contrary to the Schedule-F. It is further submitted that when vires of Schedule-F came to be upheld and held to be legal by this Court by order dated 1.9.83 and at the relevant time when the respondent No.1 was appointed i.e. on 22.9.1983, provisions of Schedule-F was made applicable and therefore, appointment of respondent No.1 was required to be made in accordance with law, especially, Schedule-F and therefore, when appointment of the respondent No.1 itself was illegal, the Tribunal ought not to have passed the order of reinstatement. Shri Joshi, the learned advocate appearing on behalf of the petitioner has further submitted that any appointment contrary to the statutory provisions is to be considered as nullity and does not create any right in favour of a person who is appointed dehors the statutory provisions and therefore, the respondent No.1 was not entitled to any protection of the provisions of the Bombay Primary Education Act and the Rules and hence, there was no question of holding any departmental inquiry against the respondent No.1 and/or as such no prior approval of the competent authority is required and the respondent No.1 was not entitled to any protection and hence, it is requested to allow the present special civil application as prayed for.

#. Shri Joshi, the learned advocate for the petitioner has relied upon the judgment of the learned Single Judge of this Court dated 27.3.1997 rendered in Special Civil Application No.2463 of 1997 in support of his submission that when appointment is made contrary to the statutory provisions, more particularly, Schedule-F, a teacher is not entitled to protection as envisaged under Section 40(B) of the Act and that his service can be terminated. Shri Joshi has also further relied on the decisions of the Hon'ble Supreme Court of India in case of A.UMARANI VS. REGISTRAR CO-OPERATIVE SOCIEITES AND OTHERS reported in 2004 (7) SCC 112 and the other decision in case of R.B.SEWAKRAM MATERNITY HOSPITAL (CHARITABLE INSTITUTION)

VS. VEERAN DEVI (SMT.) OTHERS reported in 2004 (10) SCC 548 in support of his submission that an employee who is appointed dehors the Rules his appointment can be termed as back door entry and the employee is not entitled to any relief.

#. On the other hand, Ms.Sejal Sutariya, the learned advocate appearing on behalf of the respondent No.1 has opposed the present special civil application. It is submitted that in fact, the respondent No.1 was appointed by order dated 22.8.1983 after due process of interview dated 19.8.1983 and that he is having requisite qualification i.e. S.S.C. and P.T.C.. It is also further submitted that pursuant to the appointment order dated 22.8.1983 the respondent No.1 resumed the duty on 22.9.1993 and at the relevant time i.e. at the time of appointment i.e. on 22.8.1983 there was stay granted by this Court with regard to implementation of Schedule-F and said Schedule-F came to be upheld intra-vires and legal by judgment and order dated 1.9.1983. However, stay order was continued for a further period of six weeks from 1.9.1983 and therefore, even at the time when the respondent No.1 resumed the duty on 22.9.1983 there was stay continued against implementation of Schedule-F and therefore, reasoning given by the petitioners while terminating the service of the respondent No.1 to the effect that the appointment of the respondent No.1 was not in in accordance with law with Schedule-F, cannot stand and therefore, it is submitted that the Tribunal has rightly allowed the application directing the petitioners to reinstate the respondent No.1. It is further submitted that when appointment of the respondent No.1 was in accordance with law, he was entitled to protection as granted under Section 40 (B) of the Act and before terminating his services, procedure as required under Section 40(B)(1) of the Act was required to be followed and that prior approval of the competent authority was required and therefore, under the circumstances, the action of the petitioners was contrary to the provisions of Section 40(B) of the Act which is rightly set aside by the Tribunal and hence, it is requested to dismiss the present special civil application.

#. Heard the learned advocates appearing on behalf of the parties.

#. It is not in dispute that the respondent No.1 is having requisite qualification to be appointed as Primary Teacher i.e. S.S.C. and P.T.C.. It is not in dispute that the respondent No.1 was appointed by order dated

22.8.1983 after interview process dated 19.8.1983. It is also not in dispute that the respondent No.1 served with the petitioners management for a period of 20 years. It is also not in dispute that it is the very petitioners management who appointed the respondent No.1 as far as back in the year 1983. It is also not in dispute that a show cause notice came to be issued by the petitioners for the first time on 17.1.2003, by which, the respondent No.1 was called upon as to why his service may not be terminated on the ground that his appointment is made contrary to the provisions of the Bombay Primary Education Act and Rules. Now the question which is required to be considered is whether can the petitioners management take disadvantage of their own wrong and that too after almost twenty years of service. It is required to be noted that it is not case of the petitioners management that the respondent No.1 is not having requisite qualification and/or there is any other misconduct committed by the respondent No.1. It is the contention on behalf of the petitioners management that at the relevant time when the respondent No.1 was appointed as Assistant Teacher on 22.9.83, since Schedule-F was in force which required that the appointment should be made by the Selection Committee and therefore, when the appointment of the respondent No.1 itself was not in accordance with law he is not entitled to any protection as envisaged under Section 40(B) of the Act and therefore, the Tribunal has materially erred in passing the order of reinstatement. It is also case of the petitioners that Schedule-F was stayed at the relevant time only qua the petitioners who had filed the Special Civil Applications. However, Shri Joshi, learned advocate appearing on behalf of the petitioners has failed to substantiate the said argument and has failed to show anything that the provisions of Schedule-F was stayed only qua the petitioners of those Special Civil Applications. Considering the fact that the Division Bench of this Court upheld vires of Schedule-F by judgment and order dated 1.9.1983 and till then implementation of Schedule-F was suspended, the Tribunal has come to the conclusion that at the relevant time when the respondent No.1 was appointed, Schedule-F was stayed and therefore, it cannot be said that appointment of respondent No.1 was illegal and contrary to the provisions of the Bombay Primary Education Act and the Rules. Therefore, it is held by the Tribunal that the respondent No.1 was entitled to the protection as provided under Section 40(b) (1) of the Bombay Primary Education Act and services of the respondent No.1 came to be terminated without holding any inquiry and obtaining any prior approval of the competent authority and

accordingly, set aside the action of the petitioners in terminating service of the respondent No.1 by directing the petitioners to reinstate the respondent No.1.

#. This is a petition under Article 227 of the Constitution of India and there is no jurisdictional error, much less, an error of law apparently seems to have been committed by the Tribunal which requires interference of this Court while exercising the jurisdiction under Article 227 of the Constitution of India. Even otherwise, considering the fact that the respondent No.1 was issued interview call letter dated 12.8.1983 and interviews were held on 19.8.1983 and thereafter, he came to be appointed on 22.8.1983 by the petitioners management. But fact remains that the respondent No.1 is having requisite qualification i.e. S.S.C. and P.T.C. and when the respondent No.1 was allowed to work as Primary Teacher for twenty years, it is now not open to the petitioners management to terminate service of the respondent No.1 only on the ground that appointment of respondent No.1 was not in accordance with law and/or before appointing him, proper procedure was not followed. It is the petitioners management who appointed the respondent No.1 as back as in 1983. Therefore, the petitioners cannot be permitted to take advantage of the situation and to contend that as they have committed wrong in appointing the respondent No.1 before 20 years, they may be permitted to terminate services of the respondent No.1. Permitting them to take benefit of such situation by the petitioners would be allowing the petitioners to take advantage of the wrong committed by them and that too after a period of twenty years which is not permissible. The respondent No.1 cannot be told after twenty years that when he was appointed before twenty years, no proper procedure was followed by the management. Under the circumstances also, the judgment and order passed by the Tribunal is not required to be interfered with by this Court.

##. So far as the reliance placed on the judgment of the learned Single Judge of this Court rendered in Special Civil Application No.2463 of 1997 is concerned, in the facts of the said case, the petitioners teachers were not possessing any qualification of "Primary Teacher's Training" and that against requirement of 28 teachers for 27 classes, the school had appointed as many as 50 teachers including the petitioners of that Special Civil Application and considering the educational qualification and their seniority, the petitioners' services were terminated with a view to maintaining the students and teachers ratio and in the back drop of the aforesaid

facts, the learned Single Judge of this Court has dismissed the said Special Civil Applications when services of those teachers were terminated. Under the circumstances, the said judgment will not be helpful to the case of the petitioners in the facts and circumstances of the present special civil application. Similarly, there is not dispute with regard to the ratio laid down in the judgments of the Hon'ble Supreme Court of India but considering the facts and circumstances of the case on hands, the same are also not of any assistance to the case of the petitioners. At the cost of repetition, it is required to be noted that the respondent No.1 was appointed after interview process and the respondent No.1 is having requisite qualification and on facts and on appreciation it is held by the Tribunal that at the relevant time when the respondent No.1 was appointed, implementation of the Schedule-F was stayed. Even otherwise as stated above, considering the fact that the petitioners appointed respondent No.1 in 1983 who was having all requisite qualification of becoming a Primary Teacher, cannot be permitted to take stand after a period of twenty years that the respondent No.1 was appointed dehors the rules. Under the circumstances, the present special civil application requires to be dismissed and the same is dismissed accordingly.

Notice is discharged.

Ad-interim relief granted earlier, if any, stands vacated forthwith.

: Further Order :

At this stage, Shri G.M.Joshi, the learned advocate appearing on behalf of the petitioners has requested to continue ad-interim relief granted earlier. In the facts and circumstances of the case and in view of the fact that the ad-interim relief is continued since, 2003, it is directed to be continued till 17th June, 2005.

Date : 13.5.2005 [M.R.Shah, J.]

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